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Supreme Court, U. S.
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In the Supreme Court of the United States

October Term, 1978

ALBERT BERLAND,

Petitioner,

vs.

PEOPLE OF THE STATE OF ILLINOIS,

Respondent.

PETITION FOR A WRIT OF CERTIORARI TO THE SUPREME COURT OF ILLINOIS

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In the Supreme Court of the United States

OCTOBER TERM, 1978

NO.

ALBERT BERLAND,

Petitioner,

vs.

PEOPLE OF THE STATE OF ILLINOIS,

Respondent.

PETITION FOR A WRIT OF CERTIORARI TO THE SUPREME COURT OF ILLINOIS

Petitioner, Albert Berland, prays that a Writ of Certiorari be issued to review the judgment of the Illinois Supreme Court.

OPINIONS BELOW

The opinion of the Illinois Appellate Court, dated August 11, 1977, is reported as *People* v. *Berland,* 52 Ill.App. 3d 96, 367 N.E.2d 181 (1st Dist. 1977). The opinion and supplemental opinion of the Illinois Supreme Court, dated December 4, 1978 and February 20, 1979, respectively, are reprinted in the Appendix.

JURISDICTION

The decision of the Illinois Supreme Court reversing the decision of the Illinois Appellate Court was entered on December 4, 1978. A timely Petition for Rehearing was filed by the Petitioner; the petition was denied in a supplemental opinion on February 20, 1979. The jurisdiction of this Court is invoked under Title 28 U.S.C. Section 1257(3); 62 Stat. 929.

QUESTIONS PRESENTED

1. May the State appeal from an appellate court decision reversing a conviction on the basis that the evidence was insufficient to support a finding of guilt beyond a reasonable doubt without violating the constitutional provisions against placing a person twice in jeopardy for the same offense.

2. Was evidence of Berland's and Wolf's business and social relationship, Wolf's involvement in the acquisition of the subject property and Wolf's limited managerial role in Berland's building, the poor physical and financial condition of the building and the false statement of Berland's personal history of fire losses on the fire insurance application proof beyond a reasonable doubt that Berland aided and assisted Wolf in setting the building on fire.

3. Was Berland denied his Sixth Amendment right to the effective assistance of counsel due to his trial counsel's actual incompetence during the conduct of the trial or due to a fundamental conflict of interest in which Berland was represented by the same counsel as Wolf who was charged with burning a building owned by Berland without Berland's consent.

CONSTITUTIONAL PROVISIONS INVOLVED

The Fifth Amendment to the Constitution provides in pertinent part:

> No person shall be * * * subject for the same offence to be twice put in jeopardy of life or limb; * * * deprived of life, liberty, or property, without due process of law; * * * *

The Sixth Amendment to the Constitution provides in pertinent part:

> In all criminal prosecutions, the accused shall enjoy the right * * * to have the Assistance of Counsel for his defence.

The Fourteenth Amendment to the Constitution provides in pertinent part:

> Section I. * * * No State shall make or enforce any law which shall abridge the privileges or immunities of citizens of the United States, nor shall any State deprive any person of life, liberty, or property, without due process of law, nor deny to any person within its jurisdiction the equal protection of the laws.

Article VI, Section 6 to the Constitution of the State of Illinois provides in pertinent part:

> * * * after a trial on the merits in a criminal case, there shall be no appeal from a judgment of acquittal. * * *

STATEMENT

On November 19, 1969, a fire of questioned origin partially damaged a twelve-flat residential structure on Chicago's near southwest side. Approximately three and one-half years following the fire, petitioner Albert Berland and Louis Wolf were charged with arson and conspiracy in a three-count indictment returned by the Grand Jury of the Circuit Court of Cook County. (C.2-6)[1] Count I charged that Wolf, alone, committed arson by burning Berland's building without Berland's consent, in violation of Section 20-1(a) of the Criminal Code of Illinois. Count II charged that Wolf and Berland, together, committed arson by burning Berland's building with intent to defraud the American Casualty Company and the Illinois Fair Plan Commission, in violation of Section 20-1(b) of the Criminal Code of Illinois. Count III charged that both defendants conspired on November 19, 1969, to burn Berland's building in violation of Section 8-2 of the Criminal Code of Illinois and that, in furtherance thereof, Wolf set fire to the building. Both defendants were represented by a single retained counsel throughout the trial (C.10), though Wolf retained additional counsel near the close of the State's case-in-chief nine days after the commencement of trial.[2] (Tr. 200-03)

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[1] The designation "C" is used to refer to common law record, while the designation "Tr." refers to the transcript at trial.

[2] Other attorneys filed appearances for each defendant after the trial court's finding of guilty, but before the post-trial motion stage of the proceedings. These counsel presented the post-trial motions. (E.G., C.93-96)

Both defendants waived their right to trial by jury.[3] Count I, charging Wolf alone with having burned Berland's building, was nolle prossed at the conclusion of the State's evidence. (Tr. 321)

Though there was direct eyewitness evidence at trial that the fire had been set by Wolf, there was no evidence showing Berland's presence at the scene of the fire. (Tr. 375-8) Instead, the prosecution attempted to connect Berland to Wolf's alleged conduct by circumstantial evidence which showed that Berland and Wolf had known and conducted business with each other for over thirty years, and were sometimes involved together in ownership of the subject property and other similar properties. (Tr. 60, 216, 233, 498-502, 610-11)

Other evidence showed the lack of profitability of the subject property and various court actions initiated against it because of its alleged poor physical condition. (P.Ex. 5, pp. 6-9, 29-38; P.Exs. 14-15.)

Still other evidence disclosed that Berland had given an incorrect negative answer on an application for fire insurance regarding "the applicant's five-year loss record for fire." (P.Ex. 10) At an earlier civil trial in which Berland sought compensation for the fire loss from the insurer of the building, Berland had stated that he thought the ques-

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[3] No questions were raised at any stage of the trial proceeding concerning the anomaly of one attorney's representing, according to Count I of the indictment, the accused and the victim. At the conclusion of the State's evidence, however, the trial judge did question the feasibility of continuing the proofs with the case in its hitherto unnoticed posture—with Petitioner Berland described as a victim in Count I and as a defendant in Counts II and III. (Tr. 315) Having had this inconsistency brought to its attention, the State moved to nolle prosequi Count I. (Tr. 321) Defense counsel, apparently, took no clue from this incident.

tion referred only to the building for which the insurance was being sought.[4] (P.Ex. 8, pp. 415-6)

At the conclusion of all the evidence, the trial judge found both defendants guilty as charged in Counts II and III. (Tr. 609-15) However, after arguments on the defendants' post-trial motions, the trial judge ruled that Count III was brought beyond the applicable period of limitations. Accordingly, the defendants' motions in arrest of judgment as to Count III were granted. (Tr. 889-92)

The defendants' other post-trial motions challenging, in substance, the sufficiency of the evidence and the adequacy of their representation at trial, and alleging prosecutorial misconduct and newly-discovered evidence, were all denied. (Tr. 902-3)

While reciting his original findings of guilt, the trial judge had remarked that the property was insured "far in excess" of its value, "probably three times at least the value of the property." (Tr. 611) When defense counsel attempted to prove during post-trial motions that the building was required to be insured for at least $104,559.95, arguing that the failure of defense counsel to introduce the value of the property under Illinois insurance law was one instance of incompetence of trial counsel, the Court responded:

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[4] Interestingly, as the Court of Appeals held in the civil facet of this case (*Lawndale National Bank* v. *American Casualty Company, et.*, 7th Cir. 1973, 489 F.2d 1385), the alleged misrepresentations in the application, not being of sufficient significance for incorporation into the policy itself, were not sufficient to void the policy. See *e.g.*, *Anderson* v. *John Hancock, Mut. Life Ins. Co.*, 316 Ill.App. 338; *People* v. *White*, 59 Ill.2d 416, 322 N.E.2d 1 (1974). In fact, the Seventh Circuit noted that the Illinois Fair Plan was enacted through various federal and state statutes to make insurance available in admittedly "high risk urban areas where ordinary insurance would be unavailable."

"One instance of so-called incompetence of counsel warrants particular comment. The defendants argue the trial counsel was incompetent because he failed to offer proof that the replacement value of the subject building was equal to the $100,000 insurance. This argument overlooks the fact that the market value of the property was one-third of that figure, and that for that reasons outlined in the Court's previous finding of facts, it is unlikely that a building with a $35,000 fair market value, which was a financially losing proposition, would be replaced by a $100,000 structure.

In any event, the gist of the fraud upon the insurer was the burning of the building by the insured regardless of what the replacement cost was; regardless of what the fair market value was, and regardless whether or not the building was under or over-insured." (Tr. 896-7)[5]

Each defendant was sentenced to a term not less than 1½ nor more than 4½ years in the Illinois State Penitentiary and to pay a fine of $10,000. (Tr. 927)

On appeal to the Illinois Appellate Court, Berland urged that the evidence was insufficient to prove his involvement in the alleged arson scheme and that he was denied his Sixth Amendment right to the effective assistance of counsel by reason of his retained counsel's actual incompetence as well as the constructive incompetence that follows an attorney's representing defendants with conflicting interests.

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[5] Illinois law required that all buildings be insured for at least eighty percent of their "actual cash value." Actual cash value was determined by taking the replacement cost of a building and subtracting the depreciation for age. Market value and purchase price were not considered in determining actual cash value. The policy issued with an eighty percent co-insurance clause which under Illinois law requires a certain amount of insurance to avoid a penalty proportionate to the amount of under-insurance for other than a total loss. (Tr. 75-6, 397-403) However, no evidence of the "actual cash value" of the building was offered at trial.

Upon review, the Appellate Court was moved to comment that "[t]he State's entire case against Berland is based on these inferences of normal, legal activity." The Appellate Court reversed Berland's conviction on August 11, 1977 because it could "find no evidence to connect the defendant with the burning of this building." The lower court also held that one attorney could not represent both defendants at trial due to the charge in Count 1 that Wolf burned the building without Berland's consent. Relying upon *Glasser* v. *United States*, 315 U.S. 60, 67 (1942), the Illinois Appellate Court noted that a conflict of interests between defendants in a close case required reversal of the convictions without showing specific instances of actual prejudice.[6] *People* v. *Berland*, 52 Ill.App.3d 96, 367 N.E.2d 181 (1st Dist. 1977)

The State, pursuant to Rule of the Illinois Supreme Court (Ill. Rev. Stat., 1977, Ch. 110A, §315), sought leave to appeal to the Illinois Supreme Court urging the reversal of the decision of the Appellate Court. After granting the State's motion to hear the case, the Illinois Supreme Court reversed the decision of the Appellate Court. In its opinion, the Illinois Supreme Court discounted defense contentions that the trial court's finding of guilt was due in part to his erroneous belief that the property was over-insured. The

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[6] Besides the conflict of interest issue relied upon by the Appellate Court, Berland complained that his trial counsel's conduct of the case was of such low caliber as to deny Berland reasonably effective legal representation. Berland's conviction rested on inferences drawn from various circumstances. Counsel's inattention to the case, his lack of familiarity with the law of conspiracy and of evidence in general, his inability to understand insurance law and the necessity of showing why Berland's property had to be insured as it was, all permitted Berland's conviction for arson to be based on conjecture and negative innuendos. See, *United States ex rel. Williams* v. *Twomey*, 7 Cir. 1975, 510 F.2d 634, 640-1.

Supreme Court concluded from the trial judge's final statement that Berland was convicted because of his intent to burn the building for the insurance proceeds regardless of the amount of insurance taken out on the property. In so holding, the Supreme Court determined that the circumstantial "evidence indicate[d] an intent to defraud an insurance company."[7] (App. p. 17)

The Supreme Court of Illinois also disagreed with the Illinois Appellate Court's determination that both Berland and Wolf were denied the effective assistance of counsel. *People* v. *Berland, supra*, 52 Ill. App. 3d at p. 100-1, 103. The Court held that "[A] defendant must show an actual conflict of interest manifested at trial in order to prevail in a constitutional claim of ineffective assistance of counsel due to joint representation of co-defendants by a single attorney." Defense contentions that trial counsel could not, because of his conflict, present evidence favorable to Berland despite Wolf's apparent involvement were rejected as speculative by the Illinois Supreme Court. (App. p. 7)

A Petition for Rehearing raising the additional issue of double jeopardy based upon the recent decision in *Burks* v. *United States*, 437 U.S. 1 (1978) was rejected without discussion on February 20, 1979 in a supplemental opinion.[8]

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[7] The sole fact contained in the opinion of the Illinois Supreme Court which has not been alluded to in this Statement is the false notarization of Berland's signature upon the application for the fire insurance policy. (App. p. 17) We view this fact as incidental since Berland never denied signing the application for fire insurance. (P.Ex. 8, p. 414)

[8] "Defendant Albert Berland's petition for rehearing is denied."

REASONS FOR GRANTING THE WRIT

I.

The appeal by the State from the Appellate Court's reversal of Berland's conviction which was based on the insufficiency of the evidence at trial, and the Supreme Court of Illinois' review of the Appellate Court's decision to acquit Berland, violates the double jeopardy proscriptions of the Illinois and Federal Constitutions.

The decision of the Illinois Appellate Court, in form and effect, acquitted Berland of the charge of arson with intent to defraud an insurer the same as if the order had been entered at the trial level. Article VI, Section 6 of the Constitution of the State of Illinois, and the Double Jeopardy Clause of the Fifth Amendment to the United States Constitution, bar the State from appealing any judgment of acquittal. See, *Benton* v. *Maryland*, 395 U.S. 784 (1969).

In *Burks* v. *United States*, 437 U.S. 1, 57 L. Ed. 2d 1 (1978) the Supreme Court reviewed—and reversed as inconsistent with each other and with the Double Jeopardy Clause—several of its prior decisions[9] which had considered when a reviewing court, upon reversal of a conviction, may order a new trial without violating the prohibition against placing a defendant twice in jeopardy for the same offense. Burks was convicted over his claims that he suffered from a mental illness at the time of the offense and could not be held criminally responsible for his conduct. Burks admitted the factual elements of the charge, but argued that the evidence was insufficient to show he was sane at the time of

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[9] *Bryan* v. *United States*, 338 U.S. 552 (1950); *Yates* v. *United States*, 354 U.S. 298 (1957); and *Forman* v. *United States*, 361 U.S. 416 (1957); *Burks* v *United States*, *supra*, 57 L.Ed.2d at 10.

the offense. The Court of Appeals agreed and reversed the conviction. However, rather than terminating the case against Burks, the court remanded the matter to the trial court for a new trial.

The question posed for review by this Court was "whether a defendant may be tried a second time when a reviewing court has determined that in a prior trial the evidence was insufficient to sustain the verdict of a jury." 57 L.Ed. 2d at pp. 5-6.

After identifying the conflicting portions of its prior holdings, the Court unraveled the inconsistencies by affording absolute finality to a decision in a criminal case which resolves the factual elements in the defendant's favor, even if that decision is rendered by a reviewing court. The Court reaffirmed that a reversal by a reviewing court has the effect of a judgment of acquittal which may "not be reviewed, on error or otherwise, without putting [a defendant] twice in jeopardy, and thereby violating the Constitution." See also, *United States* v. *Martin Linen Supply Co.*, 430 U.S. 564, 571 (1977).

> It is unquestionably true that the Court of Appeals' decision "represente[d] a resolution, correct or not, of some or all of the factual elements of the offense charged." United States v. Martin Linen Supply Co., 430 US 564, 571, 51 L Ed 2d 642, 97 S Ct 1349 (1977). By deciding that the government had failed to come forward with sufficient proof of petitioner's capacity to be responsible for criminal acts, that court was clearly saying that Burks' criminal culpability had not been established. If the District Court had so held in the first instance, as the reviewing court said it should have done, a judgment of acquittal would have been entered and, of course, petitioner could not be retried for the same offense. See Fong Foo v. United States, 369 US 141, 7 L Ed 2d 629, 82 S Ct 671 (1962); Kepner v. United States, 195 US 100, 49 L Ed 114, 24 S Ct 797 (1904). Consequently, as Mr. Justice Douglas correct-

> ly perceived in Sapir, it should make no difference that the *reviewing* court, rather than the trial court, determined the evidence to be insufficient, see 348 US, at 374, 99 L Ed 426, 75 S Ct 422. The appellate decision unmistakably meant that the District Court had erred in failing to grant a judgment of acquittal. To hold otherwise would create a purely arbitrary distinction between those in petitioner's position and others who would enjoy the benefit of a correct decision by the District Court. See Sumpter v. DeGroote, 552 F2d 1206, 1211-1212 (CA7 1977). (Footnote omitted) (Emphasis in original), *Burks* v. *United States, supra,* 57 L.ed.2d at p. 9.

The Supreme Court attributed the "present state of conceptual confusion" in double jeopardy analyses to the failure to distinguish "between reversals due to trial error and those resulting from evidentiary insufficiency." *Burks* v. *United States, supra,* 57 L.Ed.2d at p. 12. The Court pointed out that a reversal for trial error is without any implication of a defendant's guilt or innocence, but is a determination that there was a fundamental procedural error during the trial process which does not bar a retrial because both the sovereign and the defendant are entitled to receive a fair adjudication of guilt or innocence free from error.

> The same cannot be said when a defendant's conviction has been overturned due to a failure of proof at trial * * * Moreover, such an appellate reversal means that the Government's case was so lacking that it should not have even been *submitted* to the jury. Since we necessarily afford absolute finality to a jury's *verdict* of acquittal—no matter how erroneous its decision—it is difficult to conceive how society has any greater interest in retrying a defendant when, on review, it is decided as a matter of law that the jury could not properly have returned a verdict of guilty. (Footnote omitted) (Emphasis in original), *Burks* v. *United States, supra* 57 L.ed.2d at pp. 12-13.

Since *Burks*, supra, holds that an order of a reviewing court reversing a conviction for insufficient evidence is the equivalent, for jeopardy purposes, of a judgment of acquittal in the trial court, further prosecution by petition to have the judgment of the Illinois Appellate Court reviewed under the Illinois Supreme Court's discretionary powers was barred by the double jeopardy clauses of the Illinois and United States Constitutions. Cf. *Green* v. *United States*, 355 U.S. 184, 187-8 (1957). We respectfully submit that the proceedings following the Illinois Appellate Court's decision reversing Berland's conviction for insufficient evidence appear to be barred under this Court's recent holding in *Burks* as an unconstitutional attempt to prosecute Berland following an adjudication of his innocence based on factual considerations.

II.

Circumstantial evidence of Berland's business relationship with the accused arsonist, Wolf, Berland's prior personal relationship with Wolf, the poor condition of the subject property and the false statement of Berland's personal history of fire losses on the fire insurance application do not amount to proof beyond a reasonable doubt that Berland aided or assisted in the commission of the arson as required by the Due Process Clause of the United States Constitution.

Though conceding that the only evidence introduced against Berland was circumstantial in nature, the Illinois Supreme Court upset the decision of the appellate court which could "find no evidence to connect [Berland] with the burning of this building." *People* v. *Berland*, 52 Ill.App. 3d 96, 367 N.E.2d 181, 187 (1st Dist. 1977). While we agree in the abstract that a defendant may be accountable for the offense without personally having set the fire, we respectfully submit that the facts of Berland's prior business and

social relationship with Louis Wolf, the financial and physical condition of the building and the "false, notarized statement" on the fire insurance application are woefully inadequate to produce a conviction "upon proof beyond a reasonable doubt of every fact necessary to constitute the crime," as required by the Due Process Clause. *In Re Winship*, 397 U.S. 358, 364 (1970) (App., *infra*, pp. 16-17).

In *State* v. *Clay*, 64 S.E.2d 117, 121 (W.Va. 1951), the defendant was convicted of arson with the intent to defraud several insurance companies. Evidence disclosed that following his separation from his wife, the defendant secured insurance in an amount five times the value of certain personal property in his wife's possession after misrepresenting to the insurers that the property was in his home. Less than three months after the policies went into effect, an incendiary fire destroyed the property the day after the defendant had threatened and struck his wife for having him charged with non-support. On review, the defendant's conviction was reversed though he was "the one person in the world to whose interest it was to have this building and its contents destroyed."

A similar result was entered by the Illinois Supreme Court in *People* v. *Mutter*, 378 Ill. 216, 37 N.E.2d 790, 794-5 (1941). Two brothers were convicted of burning their store. The evidence was wholly circumstantial and included the defendants' poor financial condition, and a policy of insurance which was about to be cancelled in an amount exceeding the value of the property. The evidence against Max Mutter also included his presence at the store shortly before the fire and witnesses who testified that he had removed some of the stock before the fire broke out. The Court affirmed his conviction but reversed the conviction of the other brother, Martin, stating:

> The evidence above set forth demonstrates that the People have failed to prove Martin Mutter guilty beyond a reasonable doubt. Throughout the evidence on behalf of the People he is hardly mentioned, except on the questions of title and his family and business relationships with the other two defendants. And throughout all the evidence there is nothing to indicate that Martin himself actually did the work of setting the fire, was even present at the time of its preparation, or that he helped plan it. And there is nothing in his conduct after the fire was started to prove his guilt.

We urge this Court to review the decision of the Illinois Supreme Court in light of these holdings, and the opinion of the appellate court that there is a reasonable hypothesis to be drawn from the evidence that is consistent with Berland's innocence.

III.

The defendant was denied his constitutionally guaranteed right to the effective assistance of counsel.

In rejecting Berland's claim that he was denied the effective assistance of counsel because of his retained counsel's allegiance to his co-defendant Wolf, charged in the same indictment with burning Berland's building without Berland's consent, the Illinois Supreme Court has held that Berland "must show an actual conflict of interest manifested at trial in order to prevail . . ." This position is inconsistent with *Holloway* v. *Arkansas,* 435 U.S. 475, 55 L.ed.2d 426 (1978), and incorrectly assumes that the trial judge is under no obligation to make inquiry once he is placed on notice that there is a potential conflict between the interests of defendants represented by the same attorney.

It is axiomatic that every defendant is entitled to have the assistance of counsel (*Gideon* v. *Wainwright,* 372 U.S. 335 (1963)), and that the denial of such assistance so ef-

fects his right to a fair trial that a conviction must be reversed even if no particular prejudice is shown and even if the defendant was clearly guilty. *Holloway* v. *Arkansas*, 435 U.S. 475, 55 L.Ed.2d 426, 437 (1978). The purpose of counsel is to preserve the adversary contest by putting the prosecution to its full burden of proof through counsel's role as an "active advocate" on his client's behalf. *United States* v. *Ash*, 413 U.S. 300 (1973); *Anders* v. *California*, 386 U.S. 738, 744 (1967).

The recent decision in *Holloway* v. *Arkansas*, 435 U.S. 475, 55 L.Ed. 2d 426 (1978), is instructive in determining the proper legal standards to be applied to a claim of prejudice from joint representation. In *Holloway*, *supra*, the trial judge had been informed of the possibility of a conflict of interest between the jointly represented defendants, but denied counsel's motion for appointment of separate counsel. On appeal from their conviction, the Supreme Court of the State of Arkansas ruled, as did the Illinois Supreme Court, that " '[T]he record must show some material basis for an alleged conflict of interest, before reversible error occurs in single representation of co-defendants.' 539 S.W. 2d 435, 439 (Ark. 1977)." 55 L.Ed.2d at 432. (App., *infra*, p. 7)

After examining its prior decision in *Glasser* v. *United States*, 315 U.S. 60 (1942), and noting that it is the function of the trial judge to ensure that the accused has the assistance of counsel when the possibility of a conflict of interest between co-defendants is brought to the trial court's attention (435 U.S. at 484, 55 L.Ed.2d at 434), the Supreme Court ordered the petitioners' convictions reversed; in so doing, this Court refused once again to speculate upon the effects of the petitioners' joint representation, and rejected those decisions that require the defendant to demonstrate prejudice before ordering a reversal, stating that the right

to have the assistance of counsel was presumed to have been violated regardless of whether prejudice was independently shown.

Though the Court declared that it would not resolve the divergent approaches to this issue which courts have adopted when the possibility of a conflict had not been brought to the trial court's attention (55 L.Ed.2d at 433-4), the Court dismissed as not "susceptible to intelligent, even-handed application" any rule which requires a showing of specific prejudice due to joint representation, explaining that "the evil . . . is in what the advocate finds himself compelled to *refrain* from doing . . . Thus, an inquiry into a claim of harmless error here would require, unlike most cases, unguided speculation." 55 L.Ed.2d at 438 (emphasis in original). See also, *Chapman* v. *California*, 386 U.S. 18, 23 (1967).

In language applicable to this case, counsel for these defendants could hardly have been expected to spread of record those factors favorable to his one client, Berland, but unfavorable to his other client, Wolf. Thus, the decision in *Holloway* does not permit any inquiry which relies upon the manifestation of actual conflicting interests in the record of trial. For this reason, the proper inquiry must be limited in scope to one which requires only a "showing of a possible conflict of interest or prejudice." *United States ex rel. Hart* v. *Davenport*, 478 F.2d 203, 210 (3 Cir. 1973).[10] See, *Holloway* v. *Arkansas*, *supra*, 55 L.Ed.2d at 436-8; cf. App., *infra*, pp. 7-8.

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[10] We do not advocate automatic reversal whenever an attorney represents co-defendants. It is only when the record discloses a real possibility of conflicting interests, such as that found by the court in *United States ex rel. Hart* v. *Davenport*, supra, 478 F.2d at 207-8, 209, where the court considered the "different positions" of the defendants and pointed to an "obvious defense strategy" that was not employed on petitioner Hart's behalf.

However, even those courts that require evidence of prejudice from joint representation when the denial of assistance is not claimed until after trial, recognize the duty of the trial judge to advise the defendants as soon as the possibility of conflict comes to the court's attention. *United States* v. *LaRiche*, 439 F.2d 1088, 1095, n.5 (6 Cir. 1977); *United States* v. *Boudreaux*, 502 F.2d 557, 8 (5 Cir. 1974); *United States* v. *Carrigan*, 543 F.2d 1053 (2nd Cir. 1976); *United States* v. *Alberti*, 470 F.2d 878, 881-2 (2 Cir. 1972); *United States* v. *Christopher*, 488 F.2d 849, 851 (9 Cir. 1973); see, *United States* v. *Mandell*, 525 F.2d 671, 676 (7 Cir. 1975) (cases cited); *cf. United States* v. *Gaines*, 529 F.2d 1038, 1044 (7 Cir. 1976).

Count 1 of the indictment was a clear indication to both court and counsel that there was a conflict of interest between Berland and Wolf. However, Count I did not create the conflict in this case. Counsel created it when he ignored the warning clearly spelled out in Count I that his two clients had adverse interests. Thus, we do not point to Count I as the reason for the conflict; we point to the charge as an indication to all—and ignored by all—that such a conflict existed.

Counsel's allegiance to Wolf prohibited him from being an "active advocate" on Berland's behalf, and barred any cross-examination of his other client Wolf, identified as the arsonist, or inquiry into Wolf's motive to act alone. Even if trial counsel could be intellectually expected, under these circumstances, to introduce evidence during the defense case showing that Wolf had cause to burn the building because of some grudge or other motive contrary to Berland's interests, he could not ethically have done so. The situation is closely analogous to that encountered in *United States* v. *Gaines*, 529 F.2d 1038 (7 Cir. 1976), where trial counsel originally represented Gaines and two co-de-

fendants who eventually had conflicting trial interests. Prior to trial, counsel withdrew as the attorney for the two defendants whose interests conflicted with Gaines'. Nevertheless, as Judge Tone explained:

> "The attorney's subsequent withdrawal from his representation of Hubbard and English in this case did not remove the conflict. It continued to be his duty to refrain from taking any action adverse to their interests in a manner in which he *had* represented them. *Cf.* Marketti v. Fitzsimmons, 373 F.Supp. 647 (W.D.Wis. 1974); and *cf.* A.B.A. Code of Professional Responsibility, DR. 5-105 (A), (B)," 529 F.2d at 1042. (Emphasis added)

So here, though the offending count was removed, trial counsel was still forbidden to introduce evidence exculpatory of Berland, but inculpatory of Wolf. And it is for this reason that the cases, in precluding divided loyalties, relate back to the moment at which the divided loyalty is created. As Judge Tone explained:

> "Counsel's withdrawal from representation of some of the defendants, *even if it occurs before trial,* may not obviate the conflict problem. It does not do so if either his continuing duty to do nothing which would injure the interests of his former clients in connection with the subject matter of his representation of them *or any other incentive to avoid injuring his former clients* is in conflict with his duty of undivided loyalty to the client he continues to represent." 529 F.2d at 1044 (Emphasis added)

No citation of authority is necessary to refer to trial counsel's duty to prepare a case, in advance of trial, in such a manner as to bring to the attention of the trier of fact evidence favorable to his client. It is equally well-established that trial counsel is to employ cross-examina-

tion to the same end. In this case, trial counsel could not, because of his conflict, devote his attention in preparation and cross examination to factors explaining Berland's innocence despite Wolf's apparent involvement. The obvious rationale underlying the tenet precluding divided loyalties is not so much a fear of the actions which such a situation causes the attorney to take as it is a fear of resulting inaction by the attorney. In *Glasser* v. *United States*, 315 U.S. 60 (1942), the Supreme Court held that an attorney's representation of defendants with *potentially* inconsistent defenses was in violation of the Sixth Amendment to the Constitution. It is significant that the *Glasser* Court went far beyond holding that the facts of the case demonstrated a conflict: "Irrespective of any conflict of interest, the additional burden of representing another party *may conceivably* impair counsel's effectiveness." 315 U.S. at 75 (emphasis added). For precisely this reason the *Glasser* Court admonished that "[t]he right to have the assistance of counsel is too fundamental and absolute to allow courts to indulge in nice calculations as to the amount of prejudice arising from its denial." 315 U.S. at 76.

Any effort to distinguish *Glasser* on the basis that the defendants there objected to their joint representation represents a shocking attempt to saddle the client with responsibility for one of the evils of our profession. Judge Tone had this to say about the argument:

> "Like other constitutional rights, this right [to counsel whose loyalty is not divided between clients with conflicting interests] may be waived, * * * but the waiver must be deliberate and made with an understanding of the conflicting interests and the dangers resulting from them." *United States* v. *Gaines, supra*, 529 F.2d at 1043.

In order to implement this principle effectively, the *Gaines* Court established the following procedure:

> "*The trial court clearly does have an obligation, whether counsel is appointed or retained, to be alert for indicia of conflict at all stages of the proceeding, including during trial.* United States v. Mandell, 525 F.2d 671, 677 (7th Cir. 1975). When the possibility of a conflict appears during trial, the court must investigate the relevant facts, advise the defendant, and determine whether continued representation, absent waiver, would violate the sixth amendment. United States v. Jeffers, 520 F.2d 1256, 1263 n.11 (7th Cir. 1975). * * * (emphasis added)
>
> "When an actual conflict appears, the court must bring the fact of its existence and the resulting dangers which are reasonably foreseeable to the attention of each affected defendant so he can make an informed judgment at that time as to whether he wishes new counsel or wishes to continue with present counsel. Having done that, the court has fulfilled its duty and, if, despite the conflict and the attendant dangers, the defendant elects to continue with the same counsel, he thereby waives his sixth amendment right. * * *" 529 F.2d at 1043-44.

We urge this Court to adopt the *Gaines* procedure and, thereby, resolve the split among the Circuits noted in *Holloway* v. *Arkansas*, supra, 435 U.S. at 483-4, 55 L.Ed.2d at 433-4, and place an affirmative duty upon the trial judge to assure that criminal defendants represented by single counsel are advised of the possibility of conflicting interests. We note, however, that in the instant case where an actual conflict was manifested in the charges brought to trial that this Court's prior decisions in *Glasser* v. *United States*, supra, 315 U.S. at p. 71, and *Holloway* v. *Arkansas*, supra, 435 U.S. at pp. 434-5, place a duty of inquiry upon the trial judge which was not met.

CONCLUSION

For the above and foregoing reasons, we respectfully urge the Court to issue its Writ of Certiorari to the Supreme Court of the State of Illinois.

Respectfully submitted,

SHERMAN C. MAGIDSON
Attorney for Petitioner

CARL P. CLAVELLI
on the brief

APPENDIX

APPENDIX A

Docket Nos. 50012, 50534 cons.—Agenda 7—May 1978.

THE PEOPLE OF THE STATE OF ILLINOIS, Appellant, v. ALBERT BERLAND *et al.*, Appellees.

MR. JUSTICE KLUCZYNSKI delivered the opinion of the court:

Defendants, Louis Wolf and Albert Berland, were convicted of arson with intent to defraud an insurer (Ill. Rev. Stat. 1969, ch. 38, par. 20-1(b)) after a joint bench trial in the circuit court of Cook County. Both were sentenced to terms of 1½ to 4½ years in the Illinois State Penitentiary and fined $10,000. The appellate court reversed the convictions on two grounds: that the single, retained counsel could not effectively represent the conflicting interests of the two defendants and that there was insufficient evidence of guilt to sustain the convictions. (52 Ill. App. 3d 96.) We granted the State's petition for leave to appeal under our Rule 315 (65 Ill. 2d R. 315).

On November 19, 1969, a fire occurred in a 12-unit, three-story apartment building at 715 South Lawndale in Chicago, Illinois, owned by Berland through a land trust at the Lawndale National Bank. Firemen arrived at the scene at 11:15 or 11:30 a.m., and the fire was extinguished by about 12:30 p.m. An arson investigator from the Chicago Fire Department determined that the fire had been set. It had started when an accelerant was poured onto the floor in the bathroom or in the area between the bathroom and living room in a third-floor apartment and ignited.

Berland, through the Lawndale National Bank as trustee, initiated suit against the insurer of the building in the United States district court to recover $35,000 under the

fire insurance policy. The insurance company interposed as defenses that Berland had misrepresented his fire-loss history in the insurance application and that the fire was the result of arson. The jury returned a general verdict in favor of the insurance company. The court of appeals reversed on the ground that the misrepresentations in the application were not a defense to the policy since the application was not incorporated in or attached to it. A new trial was required because the general verdict precluded determining whether the jury had accepted the misrepresentation or arson defense, and the court refused to accept the arson defense as a matter of law. *Lawndale National Bank* v. *American Casualty Co.* (7th Cir. 1973), 489 F.2d 1384.

An Illinois grand jury returned indictments against Wolf and Berland on May 11, 1973, about 3½ years after the fire, while the civil case was pending on appeal in Federal court. Count I charged Wolf alone with knowingly damaging the real property of another without his consent under section 20-1(a) of the Criminal Code of 1961 (Ill. Rev. Stat. 1969, ch. 38, par. 20-1(a)). Count II charged Wolf and Berland together with knowingly damaging a building by means of fire with intent to defraud an insurer (Ill. Rev. Stat. 1969, ch. 38, par. 20-1(b)). Count III charged both defendants with conspiracy to commit arson (Ill. Rev. Stat. 1969, ch. 38, par. 8-2).

A single, retained attorney entered his appearance on behalf of both defendants. Each defendant waived jury trial on January 14, 1974. Both defendants pleaded not guilty. Berland did not testify. Wolf denied he was present at the time of the fire. During the presentation of the State's case, attorney Jack G. Stein entered his appearance as additional co-counsel for defendant Wolf. Thereafter, at the conclusion of the People's case, count I, charging Wolf

with the burning of the building without the owner's consent, was nol-prossed. Additional and separate counsel for each defendant appeared to present post-trial motions. A post-trial motion in arrest of judgment on the conspiracy count for both defendants was allowed on the grounds that the statute of limitations on that count had run (Ill. Rev. Stat. 1969, ch. 38, par. 3—5(b)). Judgment on the finding of guilty on the charge of arson with intent to defraud an insurer was entered.

The State introduced transcripts of depositions and testimony of Wolf and Berland from the civil case in Federal court. They were admitted pursuant to a stipulation but subject to a defense objection to references to prior fires. The trial judge correctly ruled he would consider the prior fires only if there was no remoteness and if there was a linkup between the offense in question and the prior fires, in accord with *People* v. *Bishop* (1934), 359 Ill. 112, 119-20.

The trial court also admitted into evidence a series of housing court files concerning properties found to be in violation of the Chicago housing code (Municipal Code of Chicago, ch. 78). They were admitted for the limited purpose of showing prior business relationships between Wolf and Berland in the subject and other properties, not to show prior fires. The files themselves or the testimony of Wolf and Berland in the transcripts from the Federal proceedings indicated that the properties belonged either to one of the defendants, his nominees or aliases, or those whose addresses were businesses owned by Wolf.

In 1966 defendant Wolf had negotiated the purchase of the building at 715 South Lawndale for Berland. Berland had introduced Wolf to the seller as the prospective purchaser and identified himself as the broker. Wolf

purchased the property in his name and transferred it to Berland as his nominee. Title was placed in a land trust established by Berland. At one point Wolf's nephew was given an interest in the property as collateral for a loan by Wolf to Berland. The interest was returned to Berland when the loan was paid. "Fred Cooper," an alias used by Berland, was listed as the beneficiary of the land trust at one time. The addresses given for "Fred Cooper" were two of Wolf's business addresses.

Wolf helped manage the property by selecting tenants and collecting rent. He was frequently present in the vicinity of the building. Wolf examined its physical condition, ordered coal for it, and referred contractors to Berland.

In June 1969 Berland applied for fire insurance on the property. The application was purportedly notarized at Wolf's office by Maurice Blumenthal on June 20, 1969. Blumenthal had died in a car accident in September of 1968, and the date noted for the expiration of his notary's commission was in error. The application contained a false, negative answer to a question requesting "the applicant's 5 year loss record for fire." Insurance coverage in the amount of $100,000 was issued on August 13, 1969, by the American Casualty Company. Berland introduced testimony that under the policy he was required to insure the building for $100,000; that was 80% of the "actual cash value" of the structure, which is measured by replacement cost less depreciation of up to 50% of that cost rather than by market value or purchase price. Berland paid $18,000 for the building and spent approximately $29,000 on repairs.

Prior to the fire the building was two-thirds vacant. Rent revenues had fallen from $650 per month to $250

per month. The building had been cited for 35 violations of the Municipal Code of Chicago. The building was losing money, and Berland had tried to sell it on contract on three occasions. The purchasers reneged.

Albert Kyles was across the street from 715 South Lawndale on the morning of the fire. He observed two white men drive up to the building in a dark station wagon at around 9 or 10 a.m. and park in front of the building. The building was in a largely black neighborhood. One man carried a ladder to the building; the other carried a red gas can. Judging from the way the man walked, the can was full when he entered the building and empty when he left. The men remained in the building for three to four minutes. Shortly after the men left, Kyles saw smoke coming out of the building.

Kyles identified defendant Wolf as the man carrying the gas can. Kyles had seen Wolf on three or four prior occasions at a paint store and another time when he paid Wolf the $130 rent on an apartment his aunt had leased at 715 South Lawndale.

Evelyn Mayberry saw a dark station wagon drive up to 715 South Lawndale on November 19, 1969. Two white men sat in the car for a while apparently looking to see if anyone was coming. She saw one man take a ladder out of the car. A second man took a silver-colored gasoline can from the back of the station wagon. Ms. Mayberry identified the second man as defendant Wolf, whom she had seen on several previous occasions. He had walked around to the back of the building at 715 South Lawndale on the Sunday prior to the fire. On Monday, he removed the locks from the front door. On Tuesday he drove past the building several times. On Wednesday, Wolf entered the building with the gas can between 9:30 and 10 a.m.

Ms. Mayberry went grocery shopping, and when she returned she learned there had been a fire at 715 South Lawndale.

Wolf testified on his own behalf. He stated he owned a station wagon in 1969. Three alibi witnesses testified on behalf of Wolf that they had had a meeting with him on the morning of the fire. Attorney Samuel Siegel testified Wolf was with him from 9:15 a.m. to 1:30 p.m. on November 19, 1969, and that he and Wolf had lunch together. He had no independent recollection of the meeting until he looked at his appointment calendar. The calendar, however, contained no indication of a meeting with Wolf on that day. It indicated only that Siegel had a 12:30 p.m. appointment with a client named Grosso. It did note a meeting with Wolf both two days before and two days after November 19. Ted Allen testified he saw Wolf in Siegel's office on November 19, 1969, and had lunch with Wolf. He had not remembered this meeting until he met with Siegel, Wolf, and the third alibi witness on the morning of the day he testified. The third witness, Anton Caithaimer, testified he saw Wolf at Siegel's law office between 9 a.m. and 1 p.m. on November 19, 1969. He had a cup of coffee with Wolf and Allen at about 12 p.m. Impeachment evidence consisting of time and pay records indicated Caithaimer was teaching school at that time on that day. He had been absent two days earlier.

The appellate court held that since Wolf was charged in count I with burning the building without Berland's consent, it was impossible for a single attorney to represent both defendants. It noted that the trial court should have perceived that there existed the possibility of conflicting defenses, thus it was incumbent upon the trial court to raise the issue *sua sponte* with respect to both defendants.

A defendant must show an actual conflict of interest manifested at trial in order to prevail in a constitutional claim of ineffective assistance of counsel due to joint representation of co-defendants by a single attorney. (*People* v. *Durley* (1972), 53 Ill. 2d 156, 159-61; *People* v. *McCasle* (1966), 35 Ill. 2d 552, 556; *People* v. *Somerville* (1969), 42 Ill. 2d 1, 9.) Other jurisdictions concur in this position (see *United States* v. *Mandell* (7th Cir. 1975), 525 F.2d 671, 677, *cert. denied* (1976), 423 U.S. 1049, 46 L. Ed. 2d 637, 96 S. Ct. 774; *United States* v. *Lovano* (2d Cir. 1970), 420 F.2d 769, 773; *United States* v. *Boudreaux* (5th Cir. 1974), 502 F.2d 557, 558; *United States* v. *LaRiche* (6th Cir. 1977), 549 F.2d 1088, 1095, *cert. denied* (1977), 430 U.S. 987, 52 L. Ed. 2d 383, 97 S.Ct. 1687; *United States* v. *Christopher* (9th Cir. 1973), 488 F.2d 849, 851; *State* v. *Jeffrey* (1973), 163 Mont. 92, 96, 515 P.2d 364, 367; *cf. United States* v. *Smith* (10th Cir. 1972), 464 F.2d 194, 197 (holding there must be prejudice)), although there is no consensus as to how strong a showing of conflict is required to establish a denial of the right to counsel. See *Holloway* v. *Arkansas* (1978), 435 U.S. 475, 484, 55 L. Ed. 2d 426, 434, 98 S. Ct. 1173, 1178.

The record is devoid of any evidence of an actual conflict of interest. Berland argues that count I was an indicium of a fundamental conflict which could not be cured by the fact that the count was nol-prossed. He argues that because a single attorney represented both defendants he could not prepare and try the case to show that Wolf was motivated to burn the building without Berland's assent. Wolf concurs that joint representation precluded the implementation of each defendant's interest in placing exclusive blame on the other.

These arguments are no different from those which can be raised in any instance of dual representation, yet

joint representation of co-defendants is not *per se* unconstitutional (*Holloway* v. *Arkansas* (1978), 435 U.S. 475, 482, 55 L. Ed. 2d 426, 433, 98 S. Ct. 1173, 1178; see *People* v. *Durley* (1972), 53 Ill. 2d 156, 160; *United States* v. *Mandell* (7th Cir. 1975), 525 F.2d 674, 677). The defendants merely speculate and attempt to create a conflict of interest through conjecture as to what might have been shown. They point to no actual conflict, and the record reveals none. This court will not disturb a judgment on the basis of hypothetical conflicts. *People* v. *McCasle* (1966), 35 Ill. 2d 552, 556; see also *Kruchten* v. *Eyman* (9th Cir. 1969), 406 F.2d 304, 311; *State* v. *Jeffrey* (1973), 163 Mont. 92, 97, 515 P.2d 364, 367.

Both defendants denied their guilt. Berland entered a simple denial. Wolf presented an alibi. There was no inconsistency in these defenses. Defense counsel effectively cross-examined the eyewitnesses who testified directly against Wolf by questioning the accuracy of their testimony. Count I was nol-prossed before the defense presented its evidence, thus removing any abstract possibility of conflict. Further, separate co-counsel appeared for Wolf before the close of the State's case. The record revealed no basis for either defendant to assert that the other alone burned down the building. The two men were longtime friends. Even after the fire they chose to be represented by the same counsel. The facts are analogous to those in *People* v. *McCasle* (1966), 35 Ill. 2d 552, where this court found it proper for a single attorney to represent both defendants. McCasle asserted on appeal that his co-defendant might have committed the robbery alone or with someone else, but the record contained no evidence to support such a theory. There was no inconsistency in their defenses. Both defendants denied knowing one another and presented alibi defenses.

People v. *Ware* (1968), 39 Ill. 2d 66, illustrates an instance of conflict, in contrast to facts here. A single attorney was appointed to represent two defendants. One pleaded guilty and testified against the other. There was a complete antagonism between the defendants mandating a reversal of the conviction. In *United States* v. *Gaines* (7th Cir. 1976), 529 F.2d 1038, a conflict of interest developed when defense counsel failed to call Gaines as a witness. The failure to call Gaines prevented him from retracting his withdrawn confession which had been introduced without the names of the co-defendants whom Gaines had implicated. It also served to protect his co-defendants, who counsel had represented through part of the proceedings, from the consequences of a cross-examination of Gaines concerning his confession which had implicated them.

The recent decision by the United States Supreme Court in *Holloway* v. *Arkansas* (1978), 435 U.S. 475, 55 L. Ed. 2d 426, 98 S. Ct. 1173, does not preclude joint representation. The court held that where, unlike here, appointed defense counsel raises the risk of a conflict of interest, the failure of the trial court to appoint separate counsel or take adequate steps to ascertain whether the risk was too remote to warrant separate counsel deprives the defendants of their right to the assistance of counsel. This was based on the rationale in *Glasser* v. *United States* (1942), 315 U.S. 60, 86 L. Ed. 680, 62 S. Ct. 457. There the court held that for a trial judge to insist upon joint representation in the face of objection undermines the general duty of the trial court to see that the trial is conducted with solicitude for the essential rights of the accused. In *Glasser* the trial court appointed an attorney retained by Glasser to represent his co-defendant over Glasser's objection. Actual instances of conflict appeared during the course of the trial.

By contrast, counsel here was not foisted upon either defendant. Nor does the record reveal any actual conflict. Each defendant selected and retained the trial counsel to represent him. No objection was made to joint representation until after conviction even though additional counsel represented Wolf prior to motions at the close of the State's case. See *People* v. *Somerville* (1969), 42 Ill. 2d 1, 9; *State* v. *Jeffrey* (1973), 163 Mont. 92, 97, 515 P.2d 364, 367.

People v. *Stoval* (1968), 40 Ill. 2d 109, *People* v. *Kester* (1977), 66 Ill. 2d 162, and *People* v. *Coslet* (1977), 67 Ill. 2d 127, relied upon by the defendants are not controlling. None involved joint representation of two defendants by a single attorney, and there, unlike here, actual conflicts due to competing commitments by the defense attorney to other current or former clients existed. In *People* v. *Stoval* counsel and his law firm represented the owner of the jewelry store the defendant was charged with burglarizing. In *People* v. *Kester* counsel, prior to becoming defense attorney, had worked on the case as a prosecutor. In *People* v. *Coslet* counsel represented both the defendant who had been charged with murdering her husband and the administrator of the husband's estate. A conflict arose since the estate stood to benefit from a conviction. Furthermore, all three cases involved appointed counsel, rather than retained counsel as here, demanding even closer scrutiny for conflicting interests (*People* v. *Stoval* (1968), 40 Ill. 2d 109, 113; *People* v. *Coslet* (1977), 67 Ill. 2d 127, 133; *People* v. *Kester* (1977), 66 Ill. 2d 162, 166).

This court adopted a *per se* conflict of interest rule in *People* v. *Stoval* (1968), 40 Ill. 2d 109, 113, which provides that if an attorney's commitments to others un-

dermine his loyalty to the defendant's interest, it is unnecessary to allege and prove prejudice to sustain a finding of a violation of the right to counsel. In formulating that rule this court relied upon *Glasser* v. *United States* (1942), 315 U.S. 60, 75-76, 86 L. Ed. 680, 702, 62 S. Ct. 457, 467, where it was said:

> "To determine the precise degree of prejudice sustained * * * is at once difficult and unnecessary. The right to have the assistance of counsel is too fundamental and absolute to allow courts to indulge in nice calculations as to the amount of prejudice arising from its denial."

Glasser of course concerned an instance of enforced dual representation of defendants with actual conflicting interests. The record here, however, reveals no actual conflict; thus it is unnecessary to apply the *per se* rule. See also *People* v. *Ware* (1968), 39 Ill.2d 66, 68.

Wolf argues that upon the appearance of a possible conflict it is necessary for the trial court to inquire into the nature of the potential conflicts. Some jurisdictions require the trial court to admonish all jointly represented co-defendants about the possible conflicts inherent in dual representation and to inquire whether each defendant has voluntarily and with full knowledge of the consequences decided to accept such representation. If such inquiry is not made, the prosecution must show beyond a reasonable doubt that a prejudicial conflict of interest did not exist to avoid reversal of the convictions for lack of assistance of counsel (See *Ford* v. *United States* (D.C. Cir. 1967), 379 F.2d 123, 125, relying on *Lollar* v. *United States* (D.C. Cir. 1967), 376 F.2d 243, 247; *State* v. *Olsen* (1977), ... Minn. ....., ..., 258 N.W.2d 898, 907-08; *cf. United States* v. *Lawrie* (8th Cir. 1977), 568 F.2d 98, 104-05

(placing duty on a trial court to make inquiry but holding that a presumption of prejudice does not arise if the trial court fails to make inquiry and refusing to shift the burden to the prosecution); *United States* v. *Foster* (1st Cir. 1972), 469 F.2d 1, 5 (placing duty of inquiry on the court but only shifting burden of persuasion to the prosecution to show that the existence of prejudice was improbable where inquiry was not made).) At the opposite end of the spectrum, the Seventh Circuit Court of Appeals holds only that the trial court should be watchful for indicia of conflict during trial. Only when an actual conflict appears is it necessary for the trial court to bring the fact of its existence to the attention of the defendant. (*United States* v. *Mandell* (7th Cir. 1975), 525 F.2d 671, 677; *United States* v. *Gaines* (7th Cir. 1976), 529 F.2d 1038, 1043-44.) Other jurisdictions take intermediary positions short of requiring judicial inquiry in all cases of joint representation. See *United States* v. *Lawriw* (8th Cir. 1977), 568 F.2d 98, 102-03, and cases cited therein; *State* v. *Jeffrey* (1973), 163 Mont. 92, 98, 515 P.2d 364, 368 (suggesting it would be wise to make such inquiry).

This court has refused an invitation to require trial judges to ascertain that co-defendants' decisions to proceed with one attorney are informed (*People* v. *Somerville* (1969), 42 Ill. 2d 1, 10). The crucial determination is whether there is a conflict, since absent such conflict there is no threat to a defendant's right to the assistance of separate counsel. Neither *Glasser* v. *United States* (1942), 315 U.S. 60, 86 L. Ed. 680, 62 S. Ct. 457, nor *Holloway* v. *Arkansas* (1978), 435 U.S. 475, 55 L. Ed. 2d 426, 98 S. Ct. 1173, indicate that a pretrial inquiry and waiver of separate counsel is mandated in all cases of joint representation. Because joint representation is not *per se* unconstitutional there is no need to require judicial inquiry un-

til the conflict appears. The language in *Glasser* and *Holloway* that it is the duty of the trial judge to see that the trial is conducted with solicitude for the essential rights of the accused is directed specifically to trial court insistence upon joint representation where counsel or the defendant has requested separate representation. Since there was no conflict here, judicial inquiry was not required.

The appellate court concluded there was insufficient evidence to support the convictions. On the basis of the record before us, we do not agree.

Wolf challenges the weight and credibility of the testimony of the two eyewitnesses. However, in a bench trial it is the province of the trial court to determine the credibility and weight of the testimony, to resolve the inconsistencies and conflicts therein, and to render its decision accordingly. This court will not substitute its judgment on these matters unless the proof is so unsatisfactory that a reasonable doubt of guilt appears. The trial court, unlike the reviewing court, was in a position to observe the witnesses. *People* v. *Pagan* (1972), 52 Ill. 2d 525, 534; *People* v. *Lofton* (1977), 69 Ill. 2d 67, 72-73.

The testimony of the two eyewitnesses was largely consistent both internally and when compared with the testimony of the other eyewitness. Both eyewitnesses agreed they saw two men enter the building between 9 and 10 a.m. One man, whom they identified as Wolf, carried a gas can into the building. Both had seen Wolf on several prior occasions lending further credence to their identification of him. Both identified Wolf in court. There were some inconsistencies in the testimony. Kyles said the gas can was red. Ms. Mayberry said it was silver colored. There was some confusion concerning the amount of hair Wolf had on the day of the fire as well as a discrepancy in the

testimony about the relative heights of the two men who entered the building. However, it is established that "[a] conviction will not be set aside merely because the evidence is contradictory." (*People* v. *Guido* (1962), 25 Ill. 2d 204, 208; see also *People* v. *Akis* (1976), 63 Ill. 2d 296, 298-99; *People* v. *Pagan* (1972), 52 Ill.2d 525, 533-34.) The trial judge, in handing down his decision, stated that he was impressed by the credibility of the eyewitnesses and noted that they had no reason whatsoever to lie. We perceive no basis to disturb the findings of the trial court.

The strength of the eyewitness testimony was not diminished by Wolf's alibi defense witnesses. The alibi witnesses' testimony was thoroughly impeached. Ted Allen had no recollection of the date of the meeting until he spoke with Wolf, Caithaimer, and Siegel on the day he testified. Siegel had no independent recollection of the meeting until he looked at his appointment calendar, but the calendar did not note a meeting with Wolf on that day. Caithaimer was teaching school when he testified he was meeting with Wolf. Siegel testified contrary to Caithaimer and Allen concerning who had lunch with Wolf. The trial judge was not obligated to believe the testimony of the alibi witnesses over the positive identification of the accused. (*People* v. *Jackson* (1973), 54 Ill. 2d 143, 149; *People* v. *Catlett* (1971), 48 Ill. 2d 56, 64.) Whether the alibi evidence created a reasonable doubt of guilt was a question primarily for the trial court (*People* v. *Garkus* (1934), 358 Ill. 106, 111-12), and here the trial judge indicated the alibi evidence did not convince him that the alleged meeting took place.

The appellate court placed undue emphasis on *People* v. *Gardner* (1966), 35 Ill. 2d 564, 571-73. It is clearly factually distinguishable. There, as here, guilt hinged upon the conflict between the strength of the identification tes-

timony and the strength of the alibi defense. In such cases, the alibi evidence cannot be ignored. However, this court noted that the testimony of a single witness that is positive and credible is sufficient to convict even if it is contradicted by the accused. In that case the identification of the defendant by the complaining witness was weakened by several factors, including inconsistent descriptions of the defendant and the lack of a lineup when the defendant was first identified, while the defendant's alibi was positive and unimpeached. Also, the alibi was not a recent concoction. By contrast the identification here was strong, and the alibi was impeached. Further, the alibi defense was of recent origin. The defense did not explore it until after trial began and several years after the incident.

Wolf argues that the testimony of Mayberry and Kyles is inherently incredible and, therefore, is insufficient to support a conviction. He cites *People* v. *Dawson* (1961), 22 Ill. 2d 260, 265-66. In that case the witnesses testified that a police officer went into a hotel taxi office where he was well known and demanded money from a driver at gunpoint in the presence of many witnesses after identifying himself as a police officer. He then remained in the hotel and had a drink at its bar. The witnesses here did not recount a blatantly preposterous story. They testified that two men entered a building. One man carried a gas can, and the other carried a ladder. They were men who had been seen working around the building on prior occasions. Their conduct, therefore, was not extraordinary like the alleged conduct of the defendant in *Dawson*.

Wolf also challenges the identification testimony by Mayberry and Kyles on the grounds that it was suggested by a mug shot of Wolf shown to them before trial. He did not challenge the photographic procedure prior to trial.

The witnesses were shown this picture in connection with the civil trial in the United States district court by an attorney for the insurance company before Wolf was indicted. We refrain from addressing the merits of this contention since it has been waived. *People* v. *Pierce* (1972), 52 Ill. 2d 7, 10.

Berland argues that the evidence against him was circumstantial, and therefore insufficient to support the conviction. It consisted of depositions and transcripts of proceedings from the civil case in the United States district court, housing files, the insurance application and policy, and evidence that the man who apparently notarized the application had died before the date of the application. Yet, even if the evidence was circumstantial, it is clear that it can support a conviction as long as it produces a reasonable and moral certainty that the defendant committed the crime. (*People* v. *Fletcher* (1978), 72 Ill.2d 66, 71; *People* v. *Williams* (1977), 66 Ill. 2d 478, 484-85.) Berland and Wolf were friends and business associates for 30 to 35 years. Wolf was involved in the acquisition and management of the property for Berland. The addresses of one of Berland's aliases, listed as a beneficiary of the land trust, were business addresses of Wolf. Wolf's nephew was at one point named as a beneficiary as security for a loan from Wolf to Berland. The building was losing money before the fire, and Berland was trying to sell it. He was compelled to take the property back because of the failures of the purchasers to meet the contract obligations. The poor condition in which Berland maintained the building had given rise to an action in the housing court for necessary repairs. There were 35 violations of the Municipal Code of Chicago, including the presence of vermin and structural violations.

Berland's application for fire insurance contained a false, notarized statement of his personal history of fire losses. Berland had brought the application to Wolf to have it notarized. The notary's name and seal were those of a man who had died 9 months before the application was notarized. The evidence indicates an intent to defraud an insurance company. Berland, of course, can be accountable for the offense even though he did not physically set fire to the building (Ill. Rev. Stat. 1969, ch. 38, par. 5-2). We find there was sufficient evidence to support his conviction.

The appellate court determined that the trial court erred in admitting the housing court files on relevancy grounds because the properties were not owned by the defendants. However, all were owned either by one of the defendants or their aliases. Further, the trial court did not consider similar unexplained fires on those properties. The evidence was admitted solely to show the defendants' business relationships in other similar types of property.

Berland contends that the trial court gave undue and prejudicial consideration to the fact that the property was insured for almost three times its initial cost and the cost of subsequent repairs. He argues also that he was prejudiced by his counsel's failure to introduce evidence of the replacement cost of the building after presenting evidence that insurance is calculated on the basis of replacement cost rather than acquisition cost. However, as the trial court noted, the gist of the fraud was the burning of the building to collect insurance proceeds regardless of the replacement cost and whether the building was overinsured or underinsured.

Berland and Wolf each argue it was error to admit prior statements of their co-defendant. That evidence was admitted pursuant to a stipulation subject only to an

objection to references to prior fires, and there is no indication in the record that the trial judge, sitting as the trier of fact, improperly considered the prior statements of one co-defendant as substantive evidence against the other. Under these circumstances there is no reason to deviate from the sound presumption that the court in a bench trial relies only on proper evidence in reaching a determination on the merits (*People* v. *Gilbert* (1977), 68 Ill. 2d 252, 258-59; *People* v. *Pelegri* (1968), 39 Ill. 2d 568, 574-75; *People* v. *Delno* (1966), 35 Ill. 2d 159, 162).

Because of its disposition of the cause, the appellate court did not reach all the issues presented to it, but as noted in *Nelson* v. *Union Wire Rope Corp.* (1964), 31 Ill. 2d 69, 112-13, "it has frequently been indicated that where this court acquires jurisdiction for any reason, it has jurisdiction to pass upon all questions, except those requiring a weighing of the evidence, proper to be passed upon and disposed of in the case. (*Goodrich* v. *Sprague*, 376 Ill. 80; *Bowman* v. *Illinois Central Railroad Co.*, 11 Ill. 2d 186.) Aside from considerations going to the avoidance of multiplicity of appeals, there are in our opinion unique circumstances here which, as a matter of discretion and justice, impel us to use our powers on review to the utmost and to finally dispose of the case." These proceedings arose out of a fire which occurred in 1969 for which the defendants were indicted in 1973. The parties have briefed the remaining issues of whether retained counsel was competent and whether the State violated due process by listing the witness Mayberry twice in response to discovery, once under her own name and once under the name of her common law husband. Moreover, the record enables us to fully determine these matters. (*County of Cook* v. *Lloyd A. Fry Roofing Co.* (1974), 59 Ill. 2d 131, 138-39.) We shall therefore address these questions.

Both Berland and Wolf challenge the competency of their retained trial counsel. After an examination of the record in the instant case in light of the applicable test, we cannot say that counsel was incompetent. He conducted discovery, sought to suppress evidence, and vigorously cross-examined the State's witnesses. Wolf also received the services of additional counsel who entered his appearance during the latter part of the presentation of the State's case. Defendants were entitled to competent, not perfect, counsel. *People* v. *Murphy* (1978), 72 Ill. 2d 421, 438.

Wolf argues, on the basis of *Brady* v. *Maryland* (1963), 373 U.S. 83, 10 L. Ed. 2d 215, 83 S.Ct. 1194, that he was denied a fair trial due to the prosecution's failure to notify defense counsel that the witnesses Ms. Mayberry and Ms. McGowen are the same individual. The two names appeared on a list presented to the defense in response to a discovery request for a list of witnesses. The addresses under the two names were the same. The witness had used the name McGowen, her common law husband's name, when she testified in the United States district court but used her own name, Mayberry, when she testified in the criminal action now pending.

The United States Supreme Court held in *Brady* that the prosecution's suppression of a confession by the defendant's companion deprived the accused of due process since the evidence was material to his guilt. By contrast, in the instant case the prosecution had not suppressed any evidence. Both names were furnished to the defendants. Further, as this court has noted, in determining whether it was error to allow witnesses to testify even though they had not been listed in response to discovery, the function of the list of witnesses is to prevent

surprise and afford an opportunity to combat false testimony. (*People* v. *Steel* (1972), 52 Ill. 2d 442, 450.) In the present case, the defendant was afforded an opportunity to examine the witness under both her names. The double listing did not deprive Wolf of any evidence material to his guilt; thus he was not denied a fair trial. See *United States* v. *Agurs* (1976), 427 U.S. 97, 49 L. Ed. 2d 342, 96 S. Ct. 2392.

Defendants also contended in the appellate court that the State had failed to prove the corporate existence of the insurance company alleged to have been defrauded. Even if the State failed to offer testimony to establish the insurance company's corporate existence, courts may take judicial notice of its existence since it is a matter of public record. (See *Department of Public Welfare* v. *Bohleber* (1961), 21 Ill. 2d 587, 593.) Defendants were in no way prejudiced by any failure to prove corporate existence. They were notified of the charges against them and are protected from double jeopardy; the indictment clearly identified American Casualty Company as the insurance company alleged to have been defrauded and enabled the accused to prepare their defenses (*People* v. *Dickerson* (1975), 61 Ill. 2d 580, 582; *People* v. *Grieco* (1970), 44 Ill. 2d 407, 409). Defendants are not entitled to reversal of their convictions.

For the reasons stated, the judgment of the appellate court is reversed, and the judgment of the circuit court is affirmed.

Appellate court reversed;
circuit court affirmed.

Supplemental Opinion on Denial of Rehearing

Defendant Albert Berland's petition for rehearing is denied. Defendant Louis Wolf's petition for rehearing calls this court's attention to issues raised in two petitions for relief under section 72 of the Civil Practice Act (Ill. Rev. Stat. 1975, ch. 110, par. 72) filed in the circuit court during the pendency of his direct appeal to the appellate court, which was filed on September 27, 1974. The first section 72 petition was filed on March 18, 1975; the second was filed on September 23, 1976, with a supplemental petition filed on October 8, 1976. On motion of the State, the trial court dismissed the first petition on July 18, 1975, on the ground that the issues raised were not properly before the court in the section 72 petition. The memorandum of orders included in the record and the notice of appeal in the second section 72 petition indicate that it was dismissed on February 14, 1977. Wolf prosecuted separate appeals to the appellate court, which consolidated them on its own motion on March 2, 1978. This court, on March 21, 1978, allowed the State's motion to transfer the section 72 appeals to this court and to consolidate them with the direct appeal then pending.

No oral argument was presented to this court concerning the points raised in Wolf's section 72 petitions when the consolidated cases were argued on May 10, 1978. Wolf's petition for rehearing clearly states this but argues that Wolf has been denied his right to have his appeal considered. Without deciding the nature of the asserted right to appeal, we consider whether the trial court erred in dismissing the petitions. The points relied upon are raised in the two sets of appellate briefs transferred to this court without change in substance or caption.

The circuit court properly dismissed the first section 72 petition. A section 72 proceeding is the forum in which

"to correct all errors of fact occurring in the prosecution of a cause, unknown to the petitioner and court at the time of trial, which, if then known, would have prevented the judgment." (*Ephraim* v. *People* (1958), 13 Ill. 2d 456, 458; see also *People* v. *Hinton* (1972), 52 Ill. 2d 239, 243.) Since most of the exhibits relied upon in the appellate brief were incorporated in the post-trial proceedings and in the record on direct appeal, a section 72 petition to examine them would be unwarranted. The trial court had already evaluated the exhibits in the post-trial proceedings; it had held that the evidence contained therein either was known or should have been known to the defendant prior to trial and, in any event, did not justify a new trial since it would not have probably changed the result. The trial court had also concluded, after consideration of the exhibits, that trial counsel was not incompetent.

Specifically, the matters raised in Wolf's section 72 exhibits Nos. 2, 4, 5, 6, 7, 9, 14, 21, and 23 were included in the post-trial motion, were argued at the post-trial hearing, and were incorporated in the record on direct appeal. Those exhibits contained police and fire department reports of interviews with testifying and nontestifying witnesses, transcribed statements and a deposition of testifying and nontestifying witnesses, and the Federal testimony of testifying witness Evelyn Mayberry. Variation between Ms. Mayberry's testimony at trial and her prior testimony in the United States district court was raised on direct appeal in this court. The issue of whether Wolf was bald and the defense's failure to introduce photographs of Wolf taken in 1968 and 1969 was also raised in the post-trial motion and at the post-trial hearing. A section 72 petition is not designed to provide a general review of all trial errors nor to substitute for direct appeal.

(*People* v. *Jennings* (1971), 48 Ill. 2d 295, 299; *People* v. *Mamolella* (1969), 42 Ill. 2d 69, 72; *Ephraim* v. *People* (1958), 13 Ill. 2d 456, 460.) Points previously raised at trial and other collateral proceedings cannot form the basis for a section 72 petition. See *Ephraim* v. *People* (1958), 13 Ill. 2d 456, 459; *Brunswick* v. *Mandel* (1974), 59 Ill. 2d 502, 504.

The petition argues that the State obtained Wolf's conviction through the suppression of evidence tending to negate his guilt in violation of our Rule 412 (50 Ill. 2d R. 412). However, the issue of the State's alleged suppression of evidence and noncompliance with discovery, including matters specifically raised in the section 72 petitions, were presented to the trial court at the post-trial proceedings and cannot be raised again. The fact that the State did not call all witnesses to the fire was also brought to the attention of the trial court in the post-trial proceedings.

Although a challenge to identification procedures was raised and addressed in the post-trial proceedings and on direct appeal, Wolf again raises the issue in his section 72 petition. Exhibit No. 17 is a hearsay report of interviews with witnesses allegedly conducted by Wolf's investigator after the trial court entered its judgment. The report indicates that after the fire the police showed the witnesses a mug shot of Wolf and inaccurately told them that the man in the photograph had already been arrested and charged. Exhibit No. 20 is a purported affidavit by Ms. Mayberry that someone at the police station pointed Wolf out to her as the arsonist a couple of months after the fire so she could identify him at trial. In response, the State filed two affidavits by Thomas Begg, an Illinois Bureau of Investigation agent, that witness Evelyn Mayberry and Albert Kyles told him that they never gave a post-trial statement to Wolf's investigator and that he had never

pointed Wolf out to Ms. Mayberry. The State also asserts that Ms. Mayberry's signature on exhibit No. 20 is different from another signature from a month later. The State points out that all three witnesses to whom Wolf's arguments point were known to the defense prior to trial. Robert Drain and Albert Kyles were on the State's list of witnesses. Ms. Mayberry was in fact interviewed prior to trial. There was nothing to indicate that Wolf was prevented from discovering and raising these matters at trial. (*Glenn* v. *People* (1956), 9 Ill. 2d 335, 340; see *People* v. *Colletti* (1971), 48 Ill. 2d 135, 137-38.) Further, the allegations and supporting documents were merely cumulative and would not have prevented the judgment rendered beyond a reasonable doubt. See *Williams* v. *People* (1964), 31 Ill. 2d 516, 518; *Ephraim* v. *People* (1958), 13 Ill. 2d 456, 458; *cf. Chapman* v. *California* (1967), 386 U.S. 18, 17 L. Ed. 2d 705, 87 S. Ct. 824.) The two testifying witnesses had seen Wolf prior to the fire as well as on the day of the fire, providing an adequate independent basis for the in-court identification. (See *People* v. *Williams* (1975), 60 Ill. 2d 1, 10-11.) These exhibits did not present a basis for section 72 relief.

The first petition argues that Wolf's conviction was the result of perjured testimony and relies on the exhibits filed to support the allegations. A section 72 petition can provide a basis for relief from a judgment based on perjury. (*People* v. *Jennings* (1971), 48 Ill. 2d 295, 298; *People* v. *Lewis* (1961), 22 Ill.2d 68, 70-71.) However, the trial court did not err in dismissing the petitions since all the inconsistencies in the witnesses' statements charged in the petitions as amounting to perjury were before the court in the post-trial proceedings. Counsel for Wolf presented a detailed analysis of the evidence at the post-trial hearing and intimated that the testimony given was false. Fur-

thermore, the allegations in the petition and supporting document do not support a charge of perjury and therefore offered no basis for an evidentiary hearing. (See *People* v. *Jennings* (1971), 48 Ill.2d 295, 298-99; *cf. Withers* v. *People* (1961), 23 Ill. 2d 131, 135.) An examination of the exhibits reveals no more than discrepancies in descriptions of defendant and what he was carrying given by different witnesses and by the same witnesses at different times, and variations in what different witnesses reported they saw, rather than the knowing use of false testimony. This does not indicate perjury. (See *People* v. *Strother* (1972), 53 Ill. 2d 95, 100-01; *People* v. *Lagios* (1968), 39 Ill. 2d 298, 301.) In sum, the trial court did not err in dismissing the petition.

The second section 72 petition is barred by the two-year limitations period applicable to section 72 proceedings (Ill. Rev. Stat. 1975, ch. 110, par. 72(3); *People* v. *Colletti* (1971), 48 Ill. 2d 135, 137.) The petition was filed on September 23, 1976, and the supplement to the petition was filed on October 8, 1976, which was more than two years after the judgment of conviction was entered and the sentence imposed on April 9, 1974. The bar of the statute of limitations is tolled only by legal disability, duress, or fraudulent concealment of the grounds for relief. (Ill. Rev. Stat. 1975, ch. 110, par. 72(3); *People* v. *Colletti* (1971), 48 Ill. 2d 135, 137; *Withers* v. *People* (1961), 23 Ill. 2d 131, 133.) Although Wolf, in reply to the State's motion to dismiss, alleged fraudulent concealment and generally argues that the State suppressed evidence, the trial court dismissed the section 72 petition following a hearing on the issue of fraudulent concealment and an examination of exhibits filed in support of the petition. A review of the hearing testimony by the two assistant State's Attorneys who conducted the prosecution indicates no basis on which to conclude that the State fraudulently concealed evidence

from the defendant and indicates that the judgment of dismissal is not against the manifest weight of the evidence. The substance of the testimony was that the prosecutors had never seen exhibits Nos. 3, 5, and 6, consisting of an appraisal of fire damage and two fire department reports, until several weeks prior to the hearing on the second petition, and that exhibit No. 2, the fire investigation report, was made available to defense counsel. In fact, exhibit No. 2 was attached to both the first section 72 petition and the post-trial motion. Fire Marshal Lynch, whose affidavit Wolf obtained in November 1976, was included on the State's list of witnesses.

The bar of the statute of limitations cannot be avoided by asserting that the second section 72 petition was merely a continuation of the first. Attorney Witney conceded at the hearing on the second petition that it was not a continuation of the first. The first proceedings had already terminated at the trial level, and a notice of appeal had been filed on August 16, 1975, more than a year prior to the filing of the second petition.

Even if we put aside the bar of the statute of limitations, an examination of exhibits reveals no factual allegations sufficient to sustain Wolf's charge of perjury. (See *People* v. *Jennings* (1971), 48 Ill. 2d 295, 299.) The new exhibits indicate only that the fire battalion chief and fire marshal who were present during the fire did not know what caused it and placed the point of origin at a different place than did the fire inspector who examined the premises after the fire and provided evidence at trial that the fire had been set. The fire damage appraisal indicates only that the dollar amount of damage did not correspond directly to the point of origin of the fire and the intensity of the heat in light of the size of the rooms affected and the presence of damage not attributable to the point of greater

intensity of heat. The fire inspector's in-court testimony did not contradict his written fire report. Thus the exhibits failed to support an allegation that the conviction was based on the knowing use of false testimony.

For the reasons stated, the judgments of the circuit court dismissing Wolf's section 72 petitions are affirmed and the petition for rehearing is denied.

Judgments affirmed;
rehearing denied.

APPENDIX B

UNITED STATES OF AMERICA

State of Illinois,
Supreme Court—ss.

Order of the Supreme Court, together with a copy of the opinion filed December 4, 1978, and supplemental opinion filed February 20, 1979, upon denial of petitions for rehearing.

Filed October 6, 1977.

In Witness Whereof, I have hereunto subscribed my name and affixed the Seal of said court this 16th day of May 1979.

/s/ *Clell L. Woods* (Clerk)
(SEAL) Supreme Court of the State of Illinois